STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JUNIUS BOULDING,

Defendant-Appellant.

UNPUBLISHED
January 24, 2006

No. 256836
Oakland Circuit Court
LC No. 03-190929-FC

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), arising from his sexual abuse of his six-year-old granddaughter. The trial court sentenced defendant to three concurrent prison terms of 25 to 40 years. Defendant appeals as of right. We affirm.

Defendant contends that the admission of evidence that he sexually abused each of his three daughters several years earlier deprived him of due process. However, not all alleged trial errors amount to constitutional violations. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). Substantively, we find that defendant has presented only an issue involving whether the challenged evidence qualified as admissible pursuant to MRE 404(b).

We review the trial court's ultimate decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We consider de novo any preliminary questions of law affecting the admissibility of the evidence. *Id*.

Under MRE 404(b), evidence of uncharged other acts is admissible if: (1) the evidence is offered for a purpose other than to prove the defendant's character or propensity to commit the charged crime; (2) the evidence qualifies as relevant pursuant to MRE 402; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Here, the prosecution offered three noncharacter theories to support the admission of evidence that defendant previously had sexually abused his daughters. We need only address one: the plan, scheme or system rationale for admission. After reviewing the record, we find that the charged offenses are sufficiently similar to defendant's prior uncharged conduct to

support the inference that the charged offenses were manifestations of a common plan, scheme or system. *Knox*, *supra* at 510, citing *People v Sabin (After Remand)*, 463 Mich 43, 63-64; 614 NW2d 888 (2000). The uncharged conduct and the charged offenses contained common features beyond the commission of sexual acts. In each case, defendant had a familial relationship with the victim, as a daughter or granddaughter, and occupied a position of authority over the victim. Additionally in each case, the sexual abuse started when the victims were very young, either five or six years of age. One could reasonably infer from the common features that defendant had a plan, scheme or system of taking advantage of his position of authority over young female family members to perpetrate sexual abuse. Therefore, the other act evidence was relevant to establish the actus retus of the charged offenses. *Sabin*, *supra* at 65-68, 70-71.

We reject defendant's claim that the evidence was unnecessary because the victim testified at trial. The prosecutor was not required to rely solely on the victim's testimony to prove the charged offenses. Furthermore, in light of the additional fact that the trial court cautioned the jury against relying on the other act evidence to "decide that . . . the defendant is a bad person or that he is likely to commit crimes," we find that the trial court did not abuse its discretion by determining that the danger of unfair prejudice was substantially outweighed by the probative value of the evidence under MRE 403. *Sabin*, *supra* at 70-71. We conclude that the trial court did not abuse its discretion in admitting the other act evidence at trial.

Defendant next challenges his sentence on the ground that the trial court improperly considered his failure to exhibit remorse during allocution. A sentencing court may consider evidence of a defendant's lack of remorse relative to the defendant's potential for rehabilitation, but the court may not consider a defendant's refusal to admit guilt. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). The record in this case reflects that: (1) in imposing sentence, the trial court repeatedly cited defendant's failure to express remorse or even begin to acknowledge any responsibility for his conduct to the apparent unlikelihood of the possibility that defendant might commence personal rehabilitation; and (2) when denying defendant's motion for resentencing, the trial court reiterated that it had considered defendant's lack of remorse only in assessing his rehabilitation potential. Because the record contains no indication that the court based defendant's sentence on his refusal to admit guilt, we reject defendant's sentencing challenge on this ground.

The question whether defendant's lack of remorse, as inferred from his statements at sentencing, would provide an objective and verifiable reason for departing from the sentencing guidelines is a distinct question, which defendant does not address. A defendant's failure to properly address the merits of an allegation of error constitutes an abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In any event, the trial court made it clear when denying defendant's motion for resentencing that it did not consider his lack of remorse as a basis for departing from the guidelines, but rather departed because of his history of sexually abusing his three daughters. Because defendant does not challenge the trial court's consideration of the other act evidence as a basis for departing from the guidelines, resentencing is unwarranted. *Harris*, *supra*; see also *People v Babcock*, 469 Mich 247, 271-273; 666 NW2d 231 (2003).

We also reject any suggestion that the trial court improperly exceeded the sentencing guidelines on the basis of facts found by the trial court, but not proven to a jury beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d

403 (2004). That decision does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730-731 n 14, 684 NW2d 278 (2004); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

With regard to defendant's claim that his attorney was ineffective for failing to raise a *Blakely* issue at sentencing, this issue is not properly before this Court because defendant failed to raise it in the statement of the issues presented, MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Furthermore, defendant gives the issue only cursory treatment in his brief on appeal. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Regardless, *Blakely* was not decided until after the trial court sentenced defendant and, in any event, does not apply to Michigan's indeterminate sentencing scheme. We therefore find that defense counsel was not ineffective for failing to raise the issue at defendant's sentencing.

Finally, defendant argues in a supplemental pro se brief that evidence seized from his house during the execution of a search warrant should have been suppressed because the manner of execution was unlawful. Because defendant did not move to suppress the evidence in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under current Michigan law, the suppression of evidence is not an appropriate remedy if there is a violation of "knock and announce" principles under the Fourth Amendment, Const 1963, art 1, § 11, or MCL 780.656. *People v Hudson*, 465 Mich 932; 639 NW2d 255 (2001)[1]; *People v Vasquez (After Remand)*, 461 Mich 235; 602 NW2d 376 (1999); *People v Stevens (After Remand)*, 460 Mich 626; 597 NW2d 53 (1999).

Furthermore, trial testimony indicates that before executing the search warrant, the police knocked on the door of defendant's residence and also rang the doorbell, but did not receive a response. They then called the fire department to break open the door. Because defendant did not move to suppress the evidence or seek an evidentiary hearing on this issue, it was unnecessary for the prosecution to further develop the testimony regarding the manner of execution. The limited record available does not substantiate a violation of knock and announce

[1] The Supreme Court's decision in *Hudson* arose from an interlocutory appeal. Defendant was subsequently convicted and this Court denied his appeal. We recognize that the United States Supreme Court has recently granted a petition for writ of certiorari in that later appeal. See *People v Hudson*, unpublished memorandum opinion of the Court of Appeals, issued June 17, 2004 (Docket No. 246403), lv den 472 Mich 862, cert gtd ___ US ___ ; 125 S Ct 2964; ___ L Ed 2d ___ (2005).

principles.[2] We conclude that defendant has not satisfied his burden of showing a plain error premised on the execution of the search warrant at his residence. *Carines, supra* at 763.

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper

[2] A refusal to admit entry does not require an affirmative denial from an occupant in the dwelling. *People v Slater*, 151 Mich App 432, 437; 390 NW2d 260 (1986). Even if we were to assume that no announcement was made, in light of the trial evidence that no one was home at the time of the search warrant's execution, it is arguable that an announcement would have been a futile act in this case. See *United States v Brown*, 556 F2d 304 (CA 5, 1977). Although occupants must be allowed a reasonable time to answer the door after police give proper notice of their authority and purpose, *People v Fetterley*, 229 Mich App 511, 521-524; 583 NW2d 199 (1998), the law does not require a useless gesture, *People v Polidori*, 190 Mich App 673, 677; 476 NW2d 482 (1991), cert den 506 US 905; 113 S Ct 298; 121 L Ed 2d 222 (1992).